No. 20,914

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 12,
Respondent.

BRIEF FOR RESPONDENT

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STATEMENT OF FACTS

The charging parties herein are three casuals who have only recently come to the waterfront (Tr. 96)[1] and who have businesses of their own (Tr. 114) or other jobs. They resort to the waterfront whenever they feel like picking up a few extra dollars. They are not members of the regular registered work force. Whenever they desire, they call a "tape" at the Dispatching Hall jointly operated by respondent Local 12 and the Pacific Maritime Association (hereafter PMA) to find out if casual work is available (Tr. 115) and they take such work only if they desire to do so. As casual workers, they work only a day at a time (when work is available) and when they desire to work (Tr. 69).

[1]Tr. refers to Volume II of the Transcript of Record filed by the National Labor Relations Board in this Court, being the stenographic report of the hearing held herein before the Board.

There is apparently great competition for this casual work. Thus in the fall of 1964, the period with which we are here concerned, there were only fourteen days of such work a month to be spread out over 400 casuals (Tr. 121) and of the 274 casuals who actually applied for permits in 1964, only 16 were granted (Tr. 145).

This case arose because these three casual workers were dissatisfied with the lack of work and because they "didn't like the method of hiring casuals" (Tr. 36). In August of 1964, they went to see Armstrong, a working longshoreman who was the unpaid president of Local 12. They saw him while all of them were out on a lunch break on a job (Tr. 37, 123). They voiced their grievances—that longshoremen's sons home from college on weekends were allegedly being dispatched ahead of them (Tr. 37)—and Armstrong said that he didn't know what he could do about it because dispatching was in the hands of the dispatcher, an employee of the Joint Labor Relations Committee (Tr. 38). The Joint Labor Relations Committee is composed of an equal number of Local 12 and PMA representatives. Armstrong was right and the fact is that Local 12 has nothing to do with dispatching once it elects its representatives on the Joint Labor Relations Committee and elects the dispatcher (Tr. 136-137, 148, 152, 166). The dispatcher is the agent of, and responsible to, only the Joint Labor Relations Committee (Respondent's Exhibit 2, Section 8.23 [p. 44[2]]).

[2]The exhibits introduced at the Board hearing are contained in Volume III of the Transcript of Record.

The three thereupon picketed briefly but ceased when told that a meeting would be set up with the union members of the Joint Labor Relations Committee (Tr. 39). Thereafter they spoke to a representative of PMA who advised them that the proper procedure under the contract was to present their grievance in a written form to the Joint Labor Relations Committee (Tr. 45, 47). This they did (General Counsel's Exhibit 4). In this grievance they made many assertions of fact about which they had no knowledge or information (Tr. 85-86); nevertheless they were afforded an opportunity to, and they did, meet with the Joint Labor Relations Committee (Tr. 50). They were told to go back to work, that the incident would not be held against them, and that the Joint Labor Relations Committee would look into the matter (Tr. 51).

They did go back to the Dispatch Hall and they were dispatched to such jobs as were available. However, they were apparently still dissatisfied and sent another letter of complaint (General Counsel's Exhibit 3), again making statements of fact about which they had no knowledge or information (Tr. 86). They received a reply dated September 29, 1964 (General Counsel's Exhibit 5) in which they were assured by the PMA representative that their complaints were "of grave concern"; that the Joint Labor Relations Committee had the "duty and obligation" to "guarantee" the proper operation of the Dispatch Hall; and that the matter was being investigated and would be taken care of. Instead of waiting for the Joint Labor Relations Committee procedure to resolve

the controversy, they took self-help on October 8, 1964, in the form of causing a disruption in the Dispatch Hall (Tr. 170-174, 180-185). Because of this the dispatcher lost his temper (Tr. 181-182) and evicted them from the Dispatch Hall for that day. They thereupon resumed picketing and stayed out of the hall, thereby making themselves unavailable for work for about a month.

In the meantime, the Joint Labor Relations Committee was investigating the alleged grievance, as it had the power and authority to do under the grievance arbitration machinery of the collective bargaining contract (Respondent's Exhibit 2, Section 17.15 [p. 65] and, specifically, Section 17.4 et seq. [p. 69]). While the Committee was considering this matter, and at its very next meeting, the union members of the Committee were served with the unfair labor practice charges filed by the three in this case. Thereupon, although the union members insisted upon going forward with the grievance under the contract (Tr. 141, 147-148), the employer members refused to proceed any further.

The three did not file any charges against the employer and the only complaint which the General Counsel issued was against Local 12.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDINGS THAT RESPONDENT COMMITTED AN UNFAIR LABOR PRACTICE.

This record must be read in the light of the rule laid down in *Universal Camera Corporation v. Na-*

tional Labor Relations Board, 340 US 474, 488 relating to the application of Section 10(e) of the Act:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

With this admonition in mind, it seems clear that the record considered as a whole does not make out a violation of either Section 8(b)(1)(A) or 8(b)(2).

A. The record does not show a violation of 8(b)(1)(A).

Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce employees exercising their rights under Section 7 of the Act. Section 7 gives the employees the right to engage in concerted activities for their mutual protection or to refrain from the exercise of said rights. Thus in order to make out a violation of Section 8(b)(1)(A), the record must establish, according to the standards required by the *Universal Camera* case, that the labor organization: (1) restrained or coerced employees, and (2) that it did so because the employees were engaged in protected concerted activities. We submit that this record does not support findings with respect to either of these two points.

First, there is no showing that Local 12 restrained or coerced any of the three charging parties. After the initial picketing they all returned to the hall and they were dispatched. Their grievance was in the process of orderly adjudication. They were not told to stay away from the hall until after they had created a disturbance therein. (Compare *Pacific Maritime Association and John A. Mahoney,* 140 NLRB 9).

Thereafter, and during the second picketing, they stayed away from the hall and thereby made themselves unavailable for work for almost a month. They returned at a slack time of the year and the record shows that thereafter few if any casuals were dispatched.

The General Counsel suggests that discrimination against the three subsequent to the date that they caused the disruption in the Dispatch Hall can be inferred from the alleged fact that during the fourth quarter of 1964 their earnings were lower, on the average, than they had been during the first three quarters of that year. But the record is uncontradicted that *work dropped off significantly and substantially in the last quarter of 1964* (Tr. 155, 178). Thus the dispatcher testified in response to questions put by the Trial Examiner, and without contradiction:

> "Trial Examiner: Just a moment, please, Mr. Oldland. I want to get your best recollection of this matter and I will try to make my questions clear. In the last quarter of 1964, was there any difference with respect to work by the casuals as contrasted with the other three quarters?
>
> A. Yes, there was.
>
> Trial Examiner: And how did that go—what was the difference?
>
> A. Well, in the first three quarters, of course we had—we always had a certain amount of slack times but we had upwards of *75, 100*—maybe some days, *110* casuals out at different times, when we had the gangs all working; and after about the middle of August, it dropped down there and I think the average was around *20* some

per day. *There was day in and day out that we didn't have any out at all.*" (Tr. 160).

This case is, we submit, like *Iron Workers Local 433,* 151 NLRB 1092 where the Board adopted the Trial Examiner's intermediate report recommending dismissal of the complaint. In that case, on *three* separate occasions there was a refusal to dispatch and it was charged that this refusal was in retaliation for a protest which had been made regarding the general operation of the hall. The order of dismissal was predicated upon the insufficiency of the evidence to establish that any union representative exhibited any hostility toward, or resentment of, the charging parties because of their participation in the protest. Here, too, the record fails to contain any evidence which would support such necessary findings. Jackovac, the dispatcher, was not a union agent. In any case, neither Jackovac nor anyone else expressed any hostility against the three charging parties because of their protest. Indeed the union officers appear to have been sympathetic. Armstrong told them to go ahead and picket and he acknowledged "how tough it was to be a casual" (Tr. 168) and the union members of the Joint Labor Relations Committee sought to process the grievance in the face of PMA opposition.

In order to sustain an 8(b)(1)(A) violation, it is necessary to find *specific discriminatory motivation.* As was said in the *Iron Workers* case, *supra:*

> "However, the issue here is not one of general fairness, but of specific discriminatory motivation in three instances. It may be that a more

> precise operation would even have produced different results, but in none of the incidents under scrutiny do we note such deviation from the general mode of operation that an inference of discrimination based on such deviation alone would be warranted * * *" (151 NLRB at 1100).

Furthermore, the isolated character of the dispatcher's act (Compare *Perl Pillow Company,* 152 NLRB 332) and the fact that, if anything, it was the result of a personal loss of temper (Tr. 181-182) demonstrate that no findings of specific discriminatory motivation can be made.

Second, the record does not support a finding that these three persons were engaged in protected activities. To cause a disruption in a jointly operated dispatch hall is not an activity protected by the Act (Compare *Pacific Maritime Assn. and John A. Mahoney,* 140 NLRB 9), particularly when the dispute is in the course of resolution through the regular grievance machinery set up by the collective bargaining contract (Compare *National Labor Relations Board v. Tanner Motor Livery, Ltd.,* 349 Fed. 2d 1).

B. The record does not show a violation of 8(b)(2) and there can be no order for back pay.

Section 8(b)(2) makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3). Section 8(a)(3) prohibits employer discrimination against employees "to encourage or discourage membership in any labor organization." Thus in order to establish a violation

of Section 8(b)(2), it is necessary that the evidence show, under the standards of the *Universal Camera* case, that the labor organization: (1) caused or attempted to cause an employer to discriminate against an employee, and (2) that such discrimination was for the purpose of encouraging or discouraging membership in the labor organization.

There is no evidence which could conceivably support an 8(b)(2) finding. Nothing at all shows that Local 12 did encourage, or could have encouraged, PMA to violate the Act or that PMA did so. PMA refused, on its own, to proceed with the grievance, after it learned that the charges here had been filed. The union sought to pursue the grievance but PMA, contrary to the union's wishes, would not do so. Certainly it cannot be spelled out from this that the union compelled PMA to do anything. Since there is no charge or complaint that PMA violated the Act, it is not seen how it can be claimed that Local 12 did so (Compare *Local Union No. 12, United Rubber, etc. Workers,* 150 NLRB 312, 316, n. 4).

There is certainly no evidence that any action was taken to encourage or discourage membership in any labor organization or that these three casuals were disadvantaged in any way because of their failure to be or to become members of the respondent union.

Since there is no 8(b)(2) violation, there can be no order for back pay against the local union.

The only provision in the Act which authorizes the Board to issue a back-pay order is found in Section 10(c):

> ". . . back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by [the employee] . . ."

"Discrimination" is a word of art and appears in the operative portions of the statute only in Section 8(b)(2). If the Court accepts the argument that the record considered as a whole does not support a finding of discrimination in this statutory sense, then, even though an order of "reinstatement"[3] and to post notices might stand, a back-pay order could not.

The Board itself recognized this in *United Furniture Workers of America and Colonial Hardwood Flooring Company, Inc.,* 84 NLRB 563:

> "Like the Trial Examiner, we deny the request made by the Company for an order indemnifying employees for any loss of earnings they may have suffered because of the Respondents' unfair labor practices. We believe that we are without power to take such a step in the absence of an express mandate from Congress. The amended Act provides that back pay may be required of a labor organization only where it is responsible for unlawful discrimination against an employee. An award of back pay here would be in the nature of damages to the employee for an interference with his right of ingress to the plant, as contrasted with compensation to him for losses in pay suffered by him because of severance of or interference with the tenure or terms of the employment relationship between him and his

[3]It is hard to understand to what these casual workers are to be "reinstated".

> employer in the ordinary case in which back pay is awarded and to which Section 10(c) of the Act has been held for many years to refer. The Act contains *no* provision authorizing the Board to require damages or back pay of a labor organization under such circumstances. Nor is there any legislative history that could impel a conclusion that such awards are authorized. We therefore find that the Board lacks power to grant the remedy requested by the Company in this case." (At 565-6; italics in original.)

In *Progressive Mine Workers v. National Labor Relations Board,* 187 Fed. 2d 298, the Court said:

> "We agree with the Trial Examiner that the Board's decision in the Colonial Hardwood Flooring Company case precludes the allowance of back pay under our decision. More than that, we are of the view that the Board in that case properly held its lack of authority to make an award against the union under such circumstances. Therefore, that portion of the Board's order which requires back pay either by the company or the Unions, or both, is set aside." (at 307)

The short of the argument is that Section 10(c) authorizes a monetary award against the union only when the union is "responsible" for "discrimination." Discrimination, as used in the statute, is a word of art, appearing only in Section 8(b)(2). If Congress had intended to allow a back-pay award in anything other than an 8(b)(2) case, it would hardly in (10(c), have limited back-pay recovery to cases of "discrimination" well knowing that that term appears only in Section 8(b)(2).

Since there is no discrimination here, in the 8(b)(2) sense of the word, the present order must be modified, at the very least, by striking the provisions relating to back pay.

II. THERE IS NO SUBSTANTIAL PROOF TO SUPPORT THE "AGENCY" FINDINGS.

The Board seeks to fasten liability on Local 12 by a strange agency theory; i.e., via the International's execution of the Pacific Coast contract. The International, of course, is not a party to these proceedings and therefore it became necessary for the Board to construct an elaborate scheme to impose liability upon the Local through a sort of inverse agency rationale. The "agent" is held responsible because of the action of the "principal"—a most unusual circumstance.

Even so, the whole elaborate rationale created by the Board is predicated not upon what *this* record shows but upon what some earlier record (*I.L.W.U.* and *I.L.W.U. Local 10,* 94 NLRB 1091)—admittedly with "different record facts" (TXD, page 8, n. 5 [Volume I of the Transcript of Record filed in this court, page 25, n. 5])—showed. But, as this Court pointed out in a later case involving the same problem, a local is not the agent of the International, absent proof of participation in a joint enterprise, or actual support or control, or a constitutional structure which compels such a conclusion:

> "The unfair labor practices charged against the International emanated not from procedures at the hiring hall but from actions taken by the stewards after Satchell's dispatching at the hall

had been completed.[5] In other cases an international union has been considered engaged in a joint enterprise with a local or responsible for the activities of the local and its agents when the International admitted having joined the local in authorizing the general conduct which led to the unfair practices, see Int'l Longshoremen's Union, 79 N.L.R.B. 1487, 1513-14 (1948), when the International advised, sympathized or financially supported such general conduct, Cory Corp., 84 N.L.R.B. 972 (1949), when the International through its constitution or by-laws or by some other means commanded or required the activities resulting in the unfair labor practices, see N.L.R.B. v. Millwrights' Local 2232, 5 Cir., 1960, 277 F. 2d 217, 221; American Newspaper Publishers Ass'n, 104 N.L.R.B. 806 (1953), or when the International controlled the operations of the Local, see Int'l Brotherhood of Teamsters, etc. v. United States, 4 Cir., 1960, 275 F. 2d 610, 612-614. *No evidence of such connections between the International and Local 10 was presented to the Board in the present case.*

Accordingly, we hold that on the record before us Local 10's Stewards were not acting as agents of the International on the three occasions when they prevented Satchell from working at a job to which he had been properly dispatched."

"[5]N.L.R.B. v. Int'l Longshoremen's etc. Union, 9 Cir., 1954, 210 F. 2d 581, *presents a different situation.* There the unfair labor practices were committed as part of the dispatching process itself, and the International was held responsible on the grounds that it had delegated the administration of the hiring hall to the local. To the same effect see N.L.R.B. v. Waterfront Employers of Washington, 9 Cir., 1954, 211 F. 2d 946."

(National Labor Relations Board v. International Longshoremen's & Warehousemen's Union, 283 F. 2d 558 at 565, 566. [Court's footnote; our italics].)

The case which presents the "different situation" is the very case which the Board relies upon here. Reliance upon an earlier Board decision (94 NLRB 1091) when a later Court of Appeals' decision tells us that that very case presents a "different situation" seems to us to be ill-founded. In any case the Board should have at least considered what this Court had to say about the decision upon which it was relying.

None of the relevant factors referred to by this Court is present on *this* record. Furthermore, even in the case relied on by the Board, it was the International as *principal* which was held liable for the acts of the Local as *agent*. Here, apart from the absence of any factors which would justify such a holding, the Board goes in reverse, and seeks to hold that the *Local* is the principal of the International—which clearly it is not.

III. THE BOARD'S DECISION IN THIS CASE IS CONTRARY TO THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN NATIONAL LABOR RELATIONS BOARD v. LOCAL 2, ETC., 360 FED. 2d 428.

In the *Local 2* case, *supra,* the Court of Appeals modified a Board back-pay order which did not appear to contemplate an inquiry into the length of time the employer would have kept the charging parties at work.

The Court said:

> "The right to back pay is not a punitory award for having been the victim of an unfair labor

practice; it rests on the right to have had the work and presupposes the ability to do it. To award a man 'wages which he could not have earned would not be remedial but punitive' (Chairman Farmer, concurring, in Local 57, International Union of Operating Engineers, 1954, 108 NLRB 1225, 1230). See N.L.R.B. v. U. S. Truck Co., 6th Cir. 1942, 124 F. 2d 887, 889-890; N.L.R.B. v. Waterfront Employees, 9th Cir. 1954, 211 F. 2d 946, 953; N.L.R.B. v. R. K. Baking Corp., 2d Cir. 1959, 273 F. 2d 407, 411; N.L.R.B. v. Ozark Hardwood Co., 8th Cir. 1960, 282 F. 2d 1, 8; The Red River Lumber Co., 1939, 12 NLRB 79, 89-90; Empire Worsted Mills, 1943, 53 NLRB 683, 690-692 (award approved, 2d Cir. Feb. 14, 1944); Roskam Baking Co., 1964, 146 NLRB 15, 17-18; cf. N.L.R.B. v. Mastro Plastics Corp., 2d Cir. 1965, 354 F. 2d 170, 175; N.L.R.B. v. Dazzo Products Inc., 2d Cir. 1966, 358 F. 2d 136. Paragraph 2(b) of the Board's order must be modified to permit inquiry in the compliance proceeding into the length of time for which, but for the Union's activities, the four men, on the basis of their ability and other factors, would have been kept at work by Astrove." (360 F. 2d at 434.)

Here, since the men were casuals, called the tape whenever they desired, worked only if they desired and only when work was available, the order must be modified to permit inquiry into these questions as they relate to the matter of back pay, all as required by the Court of Appeal's decision in the *Local 2* case.

IV. THE BOARD'S DECISION IN THIS CASE IS CONTRARY TO THE DECISION OF THIS COURT IN NATIONAL LABOR RELATIONS BOARD v. TANNER MOTOR LIVERY, LTD., 349 FED. 2d 1.

In the *Tanner Motor* case, *supra,* this Court remanded to the Board an order which had directed reinstatement with back pay to employees who had been discharged for picketing in support of a nondiscriminatory hiring policy. By its remand this Court directed the Board to consider whether picketing in support of such an objective was a protected activity to the extent that the picketers were insulated from discharge, at least where they had not sought to avail themselves of the grievance machinery of the governing collective bargaining contract.

This Court's opinion carefully analyzed the interrelationships between the rights guaranteed by Section 7 and the requirements established by Section 9 of the Act. It recognized that, while the protection of individual rights including Section 9(a)'s right of the individual employees to present grievances is not unimportant, one of the "principal purpose[s] of the National Labor Relations Act, as amended, is to encourage the practice and procedure of collective bargaining". (349 Fed. 2d at 4.) The Court also noted that it is customary for collective bargaining contracts to contain no strike and no picketing clauses as well as requirements that disputes are to be settled peacefully by grievance and arbitration machinery (ibid. at 5).[4]

[4]The collective bargaining contract in the case at bar has precisely such provisions (General Counsel's Exhibit 2. Section 11 [pages 51-52] contains the no-strike provisions and Section 17 pages [63-79] contains the grievance arbitration procedures).

Under such circumstances, this Court reasoned as follows:

> "If 'grievances' is held to cover any complaint or request of the employees relating to terms and conditions of employment, there may develop a sort of continuous 'collective-bargaining,' under the guise of presenting grievances, that could be inimical to the effective operation of the collective-bargaining contract. If employees who thus present 'grievances' to their employer may also resort to a picket line when they think that the employer has not properly responded to their demands, the purposes of the Act might well be defeated. There appears to be a difference between collective bargaining and presenting grievances, else why did the Congress limit the proviso in section 9(a) to grievances? Thus the desire of employees for non-discriminatory hiring, while a proper subject for collective bargaining, may not be a proper basis for a grievance. See: Elgin, Joliet & Eastern Ry. v. Burley, 1945, 325 U.S. 711, 65 S. Ct. 1282, 89 L.Ed. 1886; Hughes Tool Co. v. NLRB, 5 Cir., 1945, 147 F. 2d 69, 158 A.L.R. 1165; Douds v. Local 1250, 2 Cir., 1949, 173 F. 2d 764; NLRB v. Lundy Manufacturing Co., supra; West Texas Utilities Co. v. NLRB, 1953, 92 U.S. App. D.C. 224, 206 F.2d 442; cf. NLRB v. Cabot Carbon Co., 1959, 360 U.S. 203, 79 S.Ct. 1015, 3 L.Ed. 2d 1175; NLRB v. Puerto Rico Rayon Mills, Inc., 1 Cir., 1961, 293 F. 2d 941; Medo Photo Supply Corp. v. NLRB, 1948, 321 U.S. 678, 64 S.Ct. 830, 88 L.Ed. 1007.
>
> We do not here hold that there may be no circumstances under which presenting demands or requests, or picketing, or both, by a group of employees, in support of a policy of non-discrim-

> inatory hiring, even where there is a collective bargaining agreement in force, may be a protected activity, at least to the extent that the employees cannot be discharged for it. We think the question of whether there are such circumstances here is one that should be fully explored in the first instance by the Board, which is the expert body created by the Congress to administer the Act. We find nothing in the Board's opinion indicating that it gave any attention to this problem. We think that it should do so." (349 Fed. 2d at 5-6.)

By the same token, there is nothing in the Board's opinion in the instant case indicating that it gave any attention to this problem here, nor did it consider the fact that there exists machinery for peaceful resolution of a complaint of the nature asserted by the charging parties in this case. This Court's decision in the *Tanner Motor* case therefore requires, at the very least, a remand to the Board.

CONCLUSION

The petition to enforce the Board's order should be denied; at the very least, the order should be modified or the case should be remanded to the Board for further proceedings.

Dated, San Francisco, California,
September 19, 1966.

Respectfully submitted,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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